89-1293

No. _____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

W.C. GARCIA & ASSOCIATES, INC.,

*Petitioner*,

—v.—

FRANK S. MICELI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES F. KENNEDY
767 Fifth Avenue
47th Floor
New York, New York 10153
(212) 909-5340
*Counsel of Record*

GEORGE T. DONOGHUE, JR.
230 W. Monroe Street
Suite 2040
Chicago, Illinois 60606
(312) 236-4711

*Attorneys for Petitioner*

## QUESTIONS PRESENTED

Section 6213(a) of the Internal Revenue Code provides, in relevant part, that no assessment of a deficiency in respect of the tax in issue and no levy or proceeding in court for its collection shall be made, begun or prosecuted until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of 90 days after such mailing, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. It further provides: ". . . [T]he making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

The questions presented are:

1. Whether the court of appeals, by holding that an injunction under § 6213(a) can not be issued unless the Taxpayer shows it will suffer irreparable harm and it has no other adequate legal remedy, has failed to follow this Court's implicit holding in *Laing v. United States*, 423 U.S. 161 (1976).

2. Whether the principle of "capable of repetition, yet evading review", established in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911), prevents this case from being moot although the Internal Revenue Service abated this second invalid assessment for the same year made in violation of § 6213(a) after this injunction suit was instituted, but before the district court could rule on the merits of the suit.

## PARTIES TO THE PROCEEDING

All parties to this proceeding are contained in the caption of the case. There are no other corporations or persons who are parties to the proceeding.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** PAGE

PAGE



**Constitution, Statutes, and Treasury Regulations:**



**Regulations:**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W.C. Garcia & Associates, Inc. petitions for a writ of certiorari to review the memorandum of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The memorandum of the court of appeals (App., A) is not reported. The order of the District Court (App., B) is not reported.

### JURISDICTION

The memorandum of the court of appeals (App., A) was entered on November 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

26 U.S.C. § 6213 RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, and 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

26 U.S.C. § 7421 PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

## STATEMENT

### Summary

This is the second time W.C. Garcia & Associates, Inc. (the "Taxpayer"), a corporation, has filed suit under 26 U.S.C. § 6213(a)[1] against the Internal Revenue Service ("IRS") for the same year to enjoin the IRS from assessing and collecting a tax that was illegally assessed for the second time. The IRS has illegally seized or collected at least $172,243.50 based on the first assessment and collection activities.[2] The second time the IRS sought to collect another $2,876.84 in tax, penalty and interest in violation of § 6213(a).

When this suit was instituted in the district court, the IRS, through the U.S. Attorney, threatened to seek sanctions if the Taxpayer did not withdraw the suit. The Taxpayer refused to do so and the Government then admitted the

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1 All statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) in effect for the year in issue, unless otherwise noted.

2 When the first illegal assessment and collection action occurred, the Taxpayer instituted an injunction action similar to the present one, including a demand for the return of all funds seized or collected by the IRS to satisfy the illegal assessment. That case was W.C. Garcia & Associates, Inc. v. Michael D. Sassi, District Director, Internal Revenue, No. C-84-0224-MHP; appealed to the Ninth Circuit, No. 84-2234; petition for certiorari, No. 85-591.

The District Court (Patel, J.) denied the injunction based on *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983).

The Taxpayer then filed a notice of appeal to the Ninth Circuit but, while the appeal was pending, the IRS demanded payment of the $137,763.31 balance of the outstanding assessment. A check was sent to the IRS under protest but the Ninth Circuit found that such check was a payment and, therefore the case was moot.

When the Taxpayer filed its petition for certiorari, the Solicitor General wrote to the Clerk of the Court, stating that the United States would not respond to The Taxpayer's petition unless requested to do so by the Court. The Clerk informed the Solicitor General that the Court requested a reply be submitted. After the reply was filed, the Court denied certiorari.

assessment was in error. By that time the district court already had jurisdiction of the injunction suit, which is the sole remedy available by statute where such illegal assessment or collection action occurs, and the Taxpayer still would not withdraw its suit. Since the district court had jurisdiction to issue an injunction under § 6213(a), it also had all the inherent equitable powers for the proper and complete exercise of that jurisdiction, whether or not an injunction was granted, including entering an order that the IRS return all funds seized or collected illegally.

The relief prayed for in the complaint was:

1. That IRS be enjoined and restrained from taking any action to collect or otherwise enforce the tax, penalty and interest assessed against the Taxpayer for the taxable year ended November 30, 1975;

2. That the IRS be ordered to return to the Taxpayer all money received or seized to satisfy any illegal assessments made for the taxable year ended November 30, 1975;

3. That the Taxpayer be awarded reasonable litigation costs;[3] and

4. That such other and further relief be granted the Taxpayer as is deemed proper by the district court.

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The IRS assessed the tax, penalty and interest against the Taxpayer for the fiscal year ended November 30, 1975, without first mailing a notice of deficiency as required by 26 U.S.C. § 6213(a). To collect this illegal assessment the IRS filed a tax lien and served a notice of levy. The Taxpayer refused to pay.

After the IRS admitted that the assessment was made in error, it moved for summary judgment, and the Taxpayer moved for summary judgment.

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3 The award of litigation costs is not discussed further but is preserved if the Taxpayer is granted relief.

The IRS argued in the district court that summary judgment should be granted because the case was moot as a result of the assessment being withdrawn and, in the alternative, that an injunction could not be granted since the Taxpayer did not prove that without an injunction it would suffer irreparable harm and it had no adequate legal remedy as required under *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982).

The district court held a hearing and ordered that the IRS produce better proof that the assessment was abated and the liens released. If the IRS did not do so, the district court stated it would grant the Taxpayer an injunction. The IRS submitted an affidavit that no further collection action would be taken since the Taxpayer's "account has been paid in full." The Government never stated in the affidavit, or in any part of the record below, that collection action would cease because the IRS had not complied with § 6213(a). To the contrary, the Government argued, in the alternative, that the district court did not have the authority to enjoin the assessment and collection action even if the case were not moot because the Taxpayer had not shown both irreparable harm and no adequate legal remedy.

The district court then entered its order granting summary judgment to the IRS and denying summary judgment to the Taxpayer. In so ruling, the district court found the case to be moot and, in the alternative, the requirements of *Cool Fuel* were not met by the Taxpayer. The court of appeals affirmed on both grounds.

The IRS transcript of account for the year ended November 30, 1975, reflects that the IRS has collected at least $172,243.50 from the Taxpayer based on the first invalid assessment of a personal holding company tax of $82,833.80 plus related interest and penalties, without having ever issued a notice of deficiency.

In the Ninth Circuit the Taxpayer argued that *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982) and *Perlowin v. Sassi*, *supra*, 711 F.2d 910 (9th Cir. 1983), which

were relied upon by the Government, were contrary to this Court's opinion in *Laing v. United States*, 423 U.S. 161 (1976), and that *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), was misapplied by the Ninth Circuit in *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d at 313. *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, stand for the principle that to obtain an injunction under Section 6213(a) a taxpayer must show irreparable harm and no adequate remedy at law, and that a notice of deficiency was not sent. The Taxpayer argued that in *Laing v. United States*, *supra*, this Court, in granting an injunction under Section 6213(a), did not mention irreparable harm or no adequate remedy at law, and Mr. Laing could not have met such a burden of proof if so required.

The Taxpayer also argued that even if the injunction should not be granted, the district court should have ordered the return of the money seized and collected in violation of § 6213(a) since the district court had all the inherent equitable powers to do so under the injunction action.

The Taxpayer further argued that the case was not moot because of the principle of "capable of repetition, yet evading review" established in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911), and applied in subsequent cases of this Court.

## REASONS FOR GRANTING THE PETITION

This case provides the opportunity to correct the misapplication by the Ninth Circuit of opinions of this Court. We believe the court of appeals erred in *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982) and *Perlowin v. Sassi*, *supra*, 711 F.2d 910 (9th Cir. 1983) by failing to follow *Laing v. United States*, *supra*, 423 U.S. 161 (1976), by misapplying *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and in failing to apply *TVA v. Hill*, 437 U.S. 153 (1978). Those errors have spread to other circuits and the Government continues to rely on the Ninth Circuit's errors when it

conducts illegal assessment and collection activities. Fortuitously, in January, 1990, the United States Tax Court, in a publised decision, refused to apply the Ninth Circuit's opinions in *Cool Fuel* and *Perlowin* in an injunction action against the IRS.

The Ninth Circuit in this case also failed to apply properly the principle of "capable of repetition, yet evading review" established in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*, 219 U.S. 498 (1911).

## I

**The Ninth Circuit, in holding that the Taxpayer must establish irreparable harm and no adequate legal remedy in seeking an injunction under § 6213(a), is in conflict with the implicit holding of the Court in *Laing v. United States*, *supra*.**

26 U.S.C. § 6213(a) requires the IRS to mail a notice of deficiency to a taxpayer at the taxpayer's last known address if the IRS has determined that there is a deficiency in tax before it can assess and collect the deficiency. (None of the exceptions to this rule contained in § 6213 are relevant in this case.) The IRS must wait at least 90 days after mailing the notice of deficiency before any collection action may commence, and it must wait longer if the taxpayer chooses to contest in the United States Tax Court the correctness of the notice of deficiency. In that situation, no assessment or collection action may begin until the Tax Court decision becomes final. If the IRS attempts to make an assessment or begin any collection action without properly mailing the notice of deficiency, an injunction against such action may be issued by the District Court under § 6213(a), which is the sole remedy provided by law against violations by the IRS of § 6213(a).

Two basic types of procedural tax litigation have resulted from § 6213(a). The first involves the issue of whether the notice of deficiency was mailed to the taxpayer at the taxpay-

er's "last known address." In such cases a notice has been mailed and the IRS usually uses the address shown on the return which it has examined, but litigation results because the taxpayer may have moved since filing the return and claims some notification may have been given to alert the IRS that the taxpayer has a different address.

The Ninth Court has a long history of requiring the IRS to utilize the information it has available in mailing notices of deficiency to taxpayers at their last known addresses, thus protecting taxpayers from invalid assessment and collection activities. See, *e.g.*, *Welch v. Schweitzer*, 106 F.2d 885 (9th Cir. 1939); *Wallin v. Commissioner*, 744 F.2d 674 (9th Cir. 1984); *United States v. Zolla*, 724 F.2d 808 (9th Cir. 1984), *cert. denied*, 469 U.S. 830, *reh'g denied*, 469 U.S. 1067 (1984); *Cool Fuel, Inc. v. Connett*, *supra*; *Maxfield v. Commissioner*, 153 F.2d 325 (9th Cir. 1946).

There is an inconsistency in the court of appeals when it holds notices of deficiency invalid, and implicitly finds related assessments invalid, where such a notice is not sent to the taxpayer's last known address without considering either irreparable harm or other adequate remedy, but takes no action when assessments are made or collection action occurs without any notice of deficiency being sent to the taxpayer. It follows with even more certainty where no notice of deficiency is ever mailed to a taxpayer, assessments against such taxpayers must be invalid, regardless of the taxpayers' ability to pay such assessments and sue for refunds.

The second type of procedural litigation under § 6213(a) involves cases where assessment and collection action is threatened or commenced by the IRS without issuance of a notice of deficiency. It is this conduct by the IRS that caused the filing of this lawsuit. There is no dispute that an assessment was made by the IRS against the Taxpayer without issuance of a notice of deficiency for the year in issue, that demand was made and liens filed by the IRS for collection of the amount assessed, that a notice of levy was served on the Taxpayer for the amount assessed, that this was the second

invalid assessment made against the Taxpayer by the IRS for the same taxable year, that the IRS has already obtained at least $172,243.50 from the first illegal assessment, and that the IRS, through its lawyer, threatened to seek sanctions from the district court if the Taxpayer would not withdraw this suit.

After the Taxpayer refused to withdraw the complaint, the IRS then admitted the assessment was in error, ceased further collection action, including releasing all liens and the levy served, and claimed the case was therefore moot.

The IRS also argued that even though it was wrong to make the assessment, file liens and serve levies, the district court could not issue an injunction, which is the sole remedy allowed by statute for violation by the IRS of § 6213(a).

The IRS based this argument on *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, which hold where such assessment and collection action by the IRS is shown to exist without issuance of a notice of deficiency, the taxpayer must also show that without an injunction the taxpayer will suffer irreparable harm and that the taxpayer has no other adequate legal remedy. If a taxpayer has the funds to pay an invalid assessment without serious financial harm and can then sue for a refund, it is the position of the Ninth Circuit that irreparable harm and no adequate legal remedy have not been proven.

The Government's argument is contrary to a recent pronouncement by the United States Treasury. On May 5, 1989, the Secretary of the Treasury published regulations required by 26 U.S.C. § 6326 (added by § 6238(a) of Public Law 100-647, November 10, 1988), which allows any person to appeal to the district director after the filing of a notice of a lien for a release of such lien alleging an error in the filing of the notice of such lien. Temp. Reg. § 301.6326-IT(a). One of the four allegations which must be considered for an appeal of the filing of notice of federal tax lien is:

> "The tax liability that gave rise to the lien was assessed in violation of the deficiency procedures set forth in section 6213 of the Internal Revenue Code."

Temp. Reg. § 301.6326-IT(b)(2).

There is no requirement in the regulations or in § 6326 that a taxpayer must also show irreparable harm and no adequate remedy at law in order to seek the administrative relief from an erroneously filed notice of lien. Since the filing of a tax lien is one of the steps taken by the IRS to collect tax referred to in § 6213(a), and since all collection of tax must be in compliance with § 6213(a), it follows that the Government's argument in this case as to irreparable harm and no adequate remedy is now contradicted by this regulation issued under 26 U.S.C. § 6326.

The holding of the Ninth Circuit here is based on its opinions in *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*. Those two cases are in conflict with *Laing v. United States*, *supra*; *Steiner v. Nelson*, 259 F.2d 853 (7th Cir. 1958); *Philadelphia & Reading Corp. v. Beck*, 676 F.2d 1159 (7th Cir. 1982); *Campbell v. United States*, 532 F.2d 1057 (6th Cir. 1976); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1974), *cert. denied*, 423 U.S. 1091 (1976); *Maxwell v. Campbell*, 205 F.2d 461 (5th Cir. 1953); and *Peerless Woolen Mills v. Rose*, 28 F.2d 661 (5th Cir. 1928).

*Cool Fuel* and *Perlowin* are rejected by a recent United States Tax Court case, *Kamholz v. Commissioner*, 94 T.C. No. 2 (Prentice-Hall) (January 11, 1990), where the Tax Court enjoined the IRS from collecting a premature assessment before the time requirements are honored as listed in § 6213(a), and the Tax Court did not require the taxpayer to prove irreparable harm and no adequate legal remedy. The Tax Court acknowledged the position of the Ninth Circuit, when it said:

> "Section 6213(a) speaks permissively by providing that premature assessments and collections '*may* be enjoined' (emphasis added) by this Court. The Ninth Circuit,

> where appeal of this case would lie, has rejected the argument that proof of an improper assessment mandates injunctive relief. Along with a showing of improper assessment, the taxpayer must prove irreparable injury and an absence of an adequate legal remedy (i.e., the payment of tax followed by a suit for refund). *Jensen v. Internal Revenue Service*, 835 F.2d 196, 198 (9th Cir. 1987); *Perlowin v. Sassi*, 711 F.2d 910, 912 (9th Cir. 1983); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1982).

*Id.* at 94-10.

The Tax Court then distinguished *Kamholz* from *Cool Fuel*, *Perlowin* and *Jensen* by finding those cases did not involve collection activities by the IRS during a pendency of a case in the Tax Court. Such distinction is not relevant, however, to the interpretation of § 6213(a) in this case because that section does not hint that the application of the injunction remedy should be different where a Tax Court suit is pending.[4]

The court of appeals in *Cool Fuel* held that for a taxpayer to obtain an injunction under § 6213(a), when no notice of deficiency has been mailed, the taxpayer must first establish the standard requirements for equitable relief, *i.e.*, that it will suffer irreparable injury and that it lacks an adequate legal remedy. However, since an injunction is the only expressed remedy contained in § 6213(a), the standard requirements for

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4 § 6213(a) was amended by § 6243(a) of Public Law 100-647, November 10, 1988, which extended jurisdiction to the Tax Court under limited circumstances also to grant injunctions.

It is relevant that the Tax Court acknowledged an appeal from its decision in *Kamholz* is to the Ninth Circuit yet it did not follow the Ninth Circuit's opinion in *Cool Fuel*, *Perlowin* and *Jensen*. It is the expressed practice of the Tax Court to follow the law of the court of appeals to which its decision is appealable where squarely in point. *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970) aff'd without discussion on this point, 445 F.2d 985 (10th Cir. 1971), *cert. denied* 404 U.S. 940 (1971). Here, the Tax Court properly avoided applying that practice.

equitable relief need not be satisfied. *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860 at 869 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983). In rejecting the argument that the district court erred in granting a preliminary injunction without first requiring the establishment of the standard equitable prerequisites for such relief, the Ninth Circuit there stated at page 869:

> The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 259-261 (10th Cir. 1981); *see United States v. City and County of San Francisco*, 310 U.S. 16, 30-31 60 S. Ct. 749, 756-57, 84 L.Ed. 1050 (1940). Section 11503 clearly falls within this exception because its subsection (c) specifically authorizes a district court to grant injunctive relief to prevent a violation of the statute. *See Atchinson, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255 (expressly applying exception to § 11503). The Board provides no convincing reason why this exception should not apply in the present case. (Footnote omitted.)[5]

Here it has been shown that § 6213(a) specifically provides for an injunction as the sole remedy for violation of the notice and collection requirements yet the IRS has not attempted to give any convincing reason why this exception should not apply. In *Shadid v. Fleming*, *supra*, at 753, the Tenth Circuit said that where it is clear the statute authorizes

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5 Also see, *United States v. City and County of San Francisco*, 310 U.S. 16 (1940); *American Fruit Growers v. United States*, 105 F.2d 722 (9th Cir. 1939); *Atchinson, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255 (10th Cir. 1981), relied upon by the Ninth Circuit in *Trailer Train Co. v. State Board of Equalization*, supra; *State of Tennessee v. Louisville and Nashville R.R. Co.*, 478 F. Supp. 199 (M.D. Tenn. 1979); and *Shadid v. Fleming*, 160 F.2d 752 (10th Cir. 1947). Without saying it, this Court in *Laing v. U.S.*, *supra*, 423 U.S. 161 (1976), in a § 6213(a) injunction suit, endorsed the rule reflected in these cases.

the district court to grant injunctive relief to prevent, restrain or terminate violation of the Act in issue, the discretion of the trial court in issuing or withholding an injunction is to be exercised in light of the objectives of the Act.

Here, as in the cases such as *United States v. City and County of San Francisco* and *Trailer Train v. State Board of Equalization*, the standard requirements for equitable relief need not be satisfied and the discretion of the district court in issuing or withholding an injunction should be exercised in the light of the objective of § 6213(a). Unless the restrictions on assessment and collection of income tax contained in § 6213(a) are complied with, the section would be a mere idle gesture and would serve no purpose. *Cf.*, *American Fruit Growers v. United States*, *supra*, 105 F.2d at 725. Nor would it make any sense to litigate issues concerning notices not being mailed to the taxpayers' last known addresses if the IRS could still assess and collect the additional taxes claimed after losing such cases.

*Cool Fuel* is based on a misapplication of *Weinberger v. Romero-Barcelo*, *supra*, 456 U.S. 305 (1982), and it also fails to follow *Laing v. United States*, *supra*, 423 U.S. 161 (1976). Furthermore, it has been eroded in *Jensen v. Internal Revenue Service*, 835 F.2d 196 (9th Cir. 1987), where the court of appeals adopts some of the concern reflected by this Court in *Laing v. United States*, *supra*, about denying a taxpayer access to the Tax Court, although still fails to follow it completely. The Tax Court's recent opinion in *Kamholz v. Commissioner*, *supra*, is a clear challenge to the correctness of *Cool Fuel*.

*Weinberger v. Romero-Barcelo*, *supra*, was an injunction action to stop the United States Navy from polluting the waters off the coast of Puerto Rico. It is incorrectly relied upon by the Ninth Circuit in *Cool Fuel* because the controlling statute in *Weinberger* allowed for other remedies and an injunction was not the only means of ensuring compliance (*Id.* at 314); but under § 6213(a) an injunction is the sole remedy authorized by Congress. The Court in *Weinberger*

recognized the exception to the requirement of showing the usual equitable grounds for obtaining an injunction where the purpose and language of the statute limited the remedies available to the district court if only an injunction could vindicate the objectives of the law, and further indicated that was not the case in *Weinberger*. 456 U.S. at 314. The Ninth Circuit should have applied this principle in *Cool Fuel v. Connett*, but it failed to do so.

The Court in *Weinberger v. Romero-Barcelo*, *supra* at 314, distinguished it from *TVA v. Hill*, *supra*, 437 U.S. 153 (1978), in which an injunction was granted under a statute that contained a flat ban on the challenged act, just as in this case § 6213(a) contains a flat ban on the challenged assessment and collection action. The Court also distinguished *TVA v. Hill* by showing that refusal to enjoin the challenged action there would have ignored the explicit provisions of the governing act, stating that the purpose and language of the statute limited the remedies available to the district court and only an injunction could vindicate the objectives of the act. *Weinberger v. Romero-Barcelo*, *supra*, at 314. So too in this case, the denial of an injunction will defeat the expressed purposes of § 6213(a), particularly since the only remedy Congress has authorized is an injunction to prevent the very conduct threatened and committed.

In *Weinberger v. Romero-Barcelo*, the district court, the court of appeals, and the Supreme Court agreed some action had to be taken against the violation of the law; their differences centered on whether it should be an injunction. Here, § 6213(a) has been violated by the IRS, but if an injunction is not granted, no other action can be taken against the IRS.

In *Laing v. United States*, *supra*, the Court, in an exhaustive opinion, held that the failure of the IRS to issue a notice of deficiency in income tax and the consequent unavailability of a remedy in the Tax Court entitled the taxpayers to injunctive relief under § 6213(a) against a termination assessment of income tax made in violation of the section. Neither the majority nor the minority conditioned injunctive relief

under § 6213(a) upon a showing by the taxpayers of irreparable injury or inadequate legal remedy other than the making of an illegal assessment of income tax without prior issuance of a notice of deficiency, the effect being to prevent the taxpayers from using the Tax Court. *Id.* at 184, n. 27, 190, 195.[6]

The court of appeals here does not attempt to reconcile the IRS's conduct with the absolute prohibition in § 6213(a) against such conduct, *i.e.*, assessment and collection action without first issuing a notice of deficiency. Instead, it finds itself powerless to do anything to the IRS for such violation because § 6213(a) only allows for an injunction to be issued and, relying on *Cool Fuel* and *Perlowin*, contends that the Taxpayer must also prove irreparable harm and no adequate remedy if an injunction is to be issued.

The Ninth Circuit refrained from answering the Taxpayer's argument that *Cool Fuel* and *Perlowin* misapply opinons of this Court. Instead it merely sustained the district court by stating that there had been no showing in this case of irreparable injury and the absence of an adequate legal remedy. The court of appeals erred in such holding.[7]

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6 Unfortunately, other circuits have relied upon the requirements of *Cool Fuel* and related cases that taxpayers show irreparable harm and no adequate remedy in considering a § 6213(a) injunction, but they too have not attempted to reconcile the inconsistency of those requirements with *Laing v. United States* nor have they scrutinized *Weinberger v. Romero-Barcelo*, *supra*, 456 U.S. 305 (1982), the primary case relied upon by the Ninth Circuit in *Cool Fuel* and which we believe the court of appeals has misapplied, or *TVA v. Hill*, *supra*, 437 U.S. 153 (1978), which is applicable in this case. *E.g.*, *Lovell v. United States*, 795 F.2d 976 (11th Cir. 1986); *Flynn v. United States*, 786 F.2d 586 (3rd Cir. 1986).

7 There is strong support for the argument that the assessing and collecting of the income tax in this case without having complied with the requirements for issuing a notice of deficiency results in violation of the due process clause of the Fifth Amendment. The Sixth Circuit in *Rambo v. United States*, *supra*, at 1064-65, a § 6213(a) injunction suit, said:

(*Footnote continued*)

## II

## SINCE THE DISTRICT COURT HAD JURISDICTION TO ISSUE AN INJUNCTION UNDER § 6213(a), IT HAD ALL THE INHERENT EQUITABLE POWERS FOR THE PROPER AND COMPLETE EXERCISE OF THAT JURISDICTION WHETHER OR NOT AN INJUNCTION WAS GRANTED.

Once a court has jurisdiction in an injunction action, even if an injunction is the sole remedy expressly authorized by statute, the district court has all the inherent equitable powers available to it for the proper and complete exercise of that jurisdiction. For example, in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960), the issue was whether, in an action brought by the Secretary of Labor to enjoin violations of § 15(a)(3) of the Fair Labor Standards Act of 1938, Section 17 of that Act empowers a district court to order reimbursement for loss of wages caused by an unlawful discharge or other discrimination. Section 17 gives district courts jurisdiction: "for cause shown, to restrain violations of section 15." As to the question of whether the district court had jurisdic-

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> Were the code to be interpreted as the I.R.S. suggests, significant constitutional problems would arise. A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law. . . .
>
> Since we conclude that the taxpayer has been denied the procedural safeguards set forth herein, including access to the tax court for redetermination of the tax imposed, we affirm the judgment of the district court.

The Court in *Laing* in footnote 26 (423 U.S. at 183-184) also acknowledged the due process argument but, as the Sixth Circuit did in *Rambo*, the Court did not decide the issue because the Court agreed with the taxpayers' construction of the Code, *i.e.*, a notice of deficiency was required to be issued and absent one, an injunction lies. Likewise, we believe this case should be resolved under *Laing v. United States*, *supra*, without having to resolve the due process issue.

tion to order reimbursement of lost wages the Court said at 291:

> . . . The court below took as the touchstone for decision the principle that to be upheld the jurisdiction here contested 'must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.' 260 F.2d, at 933. In this the court was mistaken. The proper criterion is that laid down in *Porter v. Warner Co.*, 328 U.S. 395. This Court there dealt with an action brought by the Price Administration under the Emergency Price Control Act of 1942 to enjoin the collection of excessive rents and to require the landlord to reimburse its tenants for moneys paid as a result of past violations. We upheld the implied power to order reimbursement, in language of the greatest relevance here:
>
> > "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible charter than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> > "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of

> equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann*, 10 Pet. 497, 503. . . .' 328 U.S., at 397-98.
>
> The applicability of this principle is not to be denied, either because the Court there considered a wartime statute, or because, having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement. *Id.*, at 399. When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark v. Smith*, 13 Pet. 195, 203. . . .

Even though an injunction was granted in *Mitchell v. DeMario Jewelry Inc.*, *supra*, there was no holding that a showing of a right to an injunction was a prerequisite to the obtaining of an order of reimbursement. Also see, *Interstate Commerce Commission v. B&T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980), where an injunction was denied as moot but the issue of restitution for alleged violations of the Motor Carrier Act of 1935 was held to be properly before the district court, although the relevant section of the Motor Carrier Act only expressly authorized prospective injunctions to restrain future conduct, not restitution. There the First Circuit relied on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. DeMario Jewelry, Inc.*, *supra*.

The court of appeals erred in not ordering the return to the Taxpayer of all funds seized or collected in satisfaction of the illegal assessments, regardless of whether the injunction should have been granted.

## III

## IT IS NOT NECESSARY FOR THE TAXPAYER TO INSTITUTE A REFUND SUIT IN ORDER TO OBTAIN THE MONEY SEIZED AND COLLECTED BY THE IRS BASED ON ITS ILLEGAL ASSESSMENT AND COLLECTION ACTIONS.

The court of appeals erred in agreeing with the district court that the Taxpayer was attempting to use this injunction action in lieu of an action for refund and avoid the jurisdictional prerequisites for suits for refund under 26 U.S.C. § 7422(a) and seemed to imply that money or property seized by the IRS in satisfaction of illegal assessments can only be recovered by suits for refund. The only case cited by the district court in support of its holding is *Zernial v. United States*, 714 F.2d 431, 434 (5th Cir. 1983). There the Fifth Circuit held it was proper to dismiss that part of the taxpayer's suit seeking injunctive relief because subject matter jurisdiction was lacking, citing 26 U.S.C. § 7421(a), commonly known as the Anti-Injunction Act. Since this injunction suit is instituted under § 6213(a), an expressed exception to § 7421(a), the district court here had jurisdiction, and once equitable jurisdiction is found, the district court has all the inherent equitable powers available to it for the proper and complete exercise of that jurisdiction. *Zernial*, thus, is not applicable.

The district court agreed that such funds could be returned without a refund suit being instituted if a right to an injunction is established, citing *Rambo v. United States, supra.* Tax dollars improperly retained by the IRS, although initially obtained properly under the law, have been ordered returned to the taxpayer under mandamus actions. *Vishnevsky v. United States*, 581 F.2d 1249 (7th Cir. 1978), and *First Federal Savings and Loan Association of Durham v. James A. Baker, III*, 860 F.2d 135 (4th Cir. 1988). Here the funds seized by the IRS have, from the beginning, been obtained and retained in violation of the law. Under appropriate circumstances tax dollars can be ordered returned to taxpayers

in injunction actions and mandamus actions, and not just in refund suits.

This is not a refund suit and the court of appeals erred in considering it as such. In *Vishnevsky* the Seventh Circuit corrected the district court's attempt to decide that case as a refund suit (581 F.2d at 1251-53) when it was instituted as a mandamus action, and the court of appeals here erred in deciding this case based on § 7422(a) instead of § 6213(a).

## IV

## THIS CASE IS NOT MOOT AS THE RESULT OF THE IRS HAVING ABATED THE ASSESSMENT AND SUBMITTING AN AFFIDAVIT THAT NO FURTHER COLLECTION ACTIONS WILL BE TAKEN WITH RESPECT TO THE 1975 TAX YEAR AND ALL LIENS FILED IN CONNECTION THEREWITH HAVE BEEN RELEASED.

The court of appeals acknowledged that the IRS sought for the second time to collect on a deficiency without the requisite notice of deficiency having been mailed to the Taxpayer in violation of § 6213(a), but concluded there was no showing that it was likely to occur again, citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). But the criteria considered by the Court in that case, when considered in this case, should result here in a different conclusion. That case involved an injunction action by the United States against an individual and six corporations for violating the Clayton Act through the holding by the individual of interlocking directorates in three pairs of competing corporations. There the Court stated the individual defendant did not follow one adjudicated violation with others; here the IRS has twice violated the assessment procedures but contends the district court cannot stop the IRS. In *United States v. W.T. Grant Co.*, there was some question by both sides as to the legality of the defendant's actions; there has never been a question here that the conduct of the IRS is illegal. The Court, in *United States v. W.T. Grant Co.*, said it was for the defen-

dant to show that "there is no reasonable expectation that the wrong will be repeated." *Id.*, at 633. The defendants informed the district court that the interlocks no longer existed and disclaimed any intention to revive them, yet the Court stated: "Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.*, at 633. The Government here carefully avoided saying it will take no further assessment action against the Taxpayer in violation of § 6213(a).

The facts in *United States v. W.T. Grant Co.*, are clearly distinguishable from this case and the application of principles considered in *United States v. W.T. Grant Co.* to the facts in this case should result in finding this injunction issue is still alive.

Moreover, the court of appeals did not reconcile its position with *Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977). There the Ninth Circuit said in such cases the Government has a heavy burden of showing that it will not renew its challenged conduct, and mere disclaimers are not satisfactory. *Id.* at 143. Also see *United States v. W.T. Grant Co.*, *supra*, at 633. Here the Government has not attempted to meet its heavy burden and the court of appeals has ignored such defect in the Government's case. Nor has the Ninth Circuit attempted to reconcile its conclusion with the Government's failure even to disclaim for the future such assessment and collection action without issuing the requisite notice of deficiency. The Government, instead, carefully avoided such disclaimer by only stating the Taxpayer's account is paid in full. A third assessment will then make the account unpaid, and the IRS will be right back seizing assets and threatening the Taxpayer with sanctions, as it claims it can do without any action being taken by the district court to stop it. If it does so the Government cannot be reprimanded for such illegal action since it never said it would not make illegal assessments again nor attempt to collect such illegal assessments again. Nor can the Taxpayer comply with the requirements of

*Cool Fuel v. Connett*, *i.e.*, it can not show irreparable harm and no adequate legal remedy as required by the Ninth Circuit before an injunction can be granted under § 6213(a). The Taxpayer's rights can continue to be violated with impunity unless an injunction is granted.

Even if the assessment in issue was abated and all levy and collection action has terminated, where the conduct complained of is "capable of repetition, yet evading review," an injunction can still be issued. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*, 219 U.S. 498 (1911). There the Supreme Court said at 515:

> . . . The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

Likewise, in this case the IRS can abate an assessment and stop collection proceedings while the injunction action is pending, but that, the Court holds, does not moot the lawsuit.

In *Roe v. Wade*, 410 U.S. 113 (1973), where Roe sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face and an injunction restraining Wade from enforcing them, the Court considered whether the class action case became moot since Roe was no longer pregnant prior to the Supreme Court ruling. *Id.* at 123-25. The Court, in considering applying the doctrine of "capable of repetition, yet evading review", found that when Roe filed her suit she presented a case or controversy and, wholly apart from the class aspects, she, as a pregnant woman, had standing to challenge those Texas statutes. Recognizing that pregnancy often comes more than once to the

same woman, the Court found that Roe's case was not moot. *Id.* at 125.

There is no need to speculate whether the IRS would ever make another assessment against the Taxpayer, file liens, levy and seize its assets without having issued a notice of deficiency. This is the second time for the same taxable year such illegal conduct has been committed by the IRS against the Taxpayer, and the IRS fails to acknowledge such assessments, levy and collection actions are in absolute violation of § 6213(a). Since two such assessment and collection activities have been instituted against the Taxpayer, it is reasonable to expect that the IRS will do it again at its sole discretion if it is so moved.[8] It is also reasonable to expect that if there are any subsequent illegal assessments, the IRS will again threaten to seize the Taxpayer's assets, as was done in the first case, or threaten the Taxpayer with sanctions if such illegal assessments are protested in court and are not paid, just as was done in this case. The IRS could either threaten to seize assets over the Taxpayer's protests and attempt to convince a court such amounts are payments, as the IRS did in the first case, or it can abate the illegal assessment, as it did in this case, but claim under either method that the case is moot before the injunction action can be fully reviewed. The IRS ought not be allowed to do this.

The court of appeals erred in finding this case to be moot.

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8 The IRS has also taken this position against other taxpayers. *E.g.*, *Koger v. United States*, 755 F.2d 1094 (4th Cir. 1985); *Church of St. Matthew v. United States*, _____ F.Supp. _____, 56 AFTR2d 85-5809 (E.D.N.Y. 1985); *Kamholz v. Commissioner*, *supra*, 94 T.C. No. 2 (January 11, 1990). We have no way of determining how many times the IRS has taken this position because we do not have access to the unreported cases, such as this case and the first case of the Taxpayer, where the issue was present.

Although the memorandum of the court of appeals in this case is unpublished, the Government has it and must receive great comfort from it, published or not. The harm to taxpayers in general is therefore great, and the implications of the memorandum should be evaluated as if it had been published.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. KENNEDY
767 Fifth Avenue
47th Floor
New York, New York 10153
(212) 909-5340
*Counsel of Record*

GEORGE T. DONOGHUE, JR.
230 W. Monroe Street
Suite 2040
Chicago, Illinois 60606
(312) 236-4711

*Attorneys for Petitioner*

February 1990

# APPENDIX

**APPENDIX A**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 88-15393

D.C. No. CV-87-5771-MHP

Submitted October 31, 1989[1]

Filed: November 16, 1989

W.C. GARCIA & ASSOC., INC.,

*Plaintiff-Appellant*,

—VS.—

FRANK S. MICELI, District Director,
Internal Revenue Service,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
MARILYN H. PATEL, DISTRICT JUDGE, PRESIDING

Before:

ALARCON, O'SCANNLAIN, and LEAVY, *Circuit Judges.*

1 The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

## MEMORANDUM[2]

W.C. Garcia & Associates ("Garcia") appeals the district court's grant of summary judgment in favor of the IRS. On appeal, Garcia argues that the court erred by (1) not enjoining the IRS from collecting a tax deficiency; (2) not ordering the return of money seized in a prior deficiency action; and (3) not awarding litigation costs against the government. We reject these arguments and we affirm.

The district court concluded that Garcia's action for injunctive relief in this case was rendered moot by the IRS's decision to abate the assessment and to release all liens. We agree. Although this is the second time the IRS has sought to collect on this delinquency without the requisite notice of deficiency to the taxpayer, *see* 26 U.S.C. § 6213(a), there has been no showing that the event will likely occur again. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.").

Even if the controversy was not moot, we fail to see how the district court could have afforded Garcia the injunctive relief it sought. There was no showing in this case of the necessary irreparable injury and the absence of an adequate legal remedy. *See Perlowin v. Sassi*, 711 F.2d 910, 912 (9th Cir. 1983); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313-14 (9th Cir. 1982). Garcia paid the first assessment and therefore had an adequate remedy in district court to seek a refund pursuant to 26 U.S.C. § 7422. *See Cool Fuel*, 685 F.2d at 314. We agree with the district court that Garcia may not, however, seek such a refund in this action and thereby avoid the jurisdictional prerequisites of section 7422(a).

Finally, Garcia contends it should be awarded its reasonable litigation costs pursuant to 26 U.S.C. § 7430(a). We disagree. Although the IRS admitted that its second assessment was erroneous, there has been no showing that the govern-

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2 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

ment's position throughout these proceedings was not substantially justified. *See* 26 U.S.C. § 7430(c)(4)(A)(i).

AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 87-5771 MHP

Filed: July 22, 1988

W.C. GARCIA & ASSOCIATES, INC.,

*Plaintiff,*

—vs.—

FRANK S. MICELLI [sic] District Director,
Internal Revenue Service,

*Defendant.*

### ORDER

This case was brought to enjoin the defendant from assessing a corporate income tax deficiency and from collecting money in the value of that assessment plus the interest and late penalty, and to recover money already collected. The complaint alleges that defendant levied taxes without providing a notice of the deficiency in violation of 26 U.S.C. § 6212(a). The case is now before the court on cross-motions for summary judgment. Having considered the submissions and arguments of the parties, for the following reasons, the court denies plaintiff's motion and grants defendant's motion.

BACKGROUND

In 1984 plaintiff W.C Garcia & Associates, in a similar action, unsuccessfully sought to enjoin defendant Internal Revenue Service ("Service") from levying corporate income taxes for the taxable year ending November 30, 1975 by alleging that the service failed to provide notice of the deficiency before assessment and collection. In 1987 the Service, through an error, again proceeded to levy taxes for the tax period ending November 30, 1975 and, again, failed to provide plaintiff with a deficiency notice. The Service discovered the error and cancelled its collection effort.

DISCUSSION

Plaintiff seeks an injunction and refund of money collected or seized. The complaint alleges that the Service levied amounts due in taxes without providing the corporation with a notice of deficiency. A mailed notice of deficiency to the taxpayer is a prerequisite to assessment and collection. *See United States v. Zolla*, 724 F.2d 808, 810 (9th Cir.), *cert. denied*, 469 U.S. 830, *reh'g denied*, 469 U.S. 1067 (1984). At time of the hearing on this motion, the Assistant United States Attorney represented that the Service had abated its assessment and, therefore, the plaintiff's claim was moot. However, the declaration and supporting Service document were not totally clear on this point. The court requested a declaration setting forth the status of the assessment and that declaration was filed on June 6, 1988. According to the declaration, made by an authorized employee, no further collection actions will be taken with respect to the 1975 tax year and all liens filed in connection therewith have been released.

An action for injunctive relief "is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *William v. Alioto*, 549 F.2d 136, 140-41 (9th Cir. 1977) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). An exception occurs when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party

would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Plaintiff's action for injunctive relief is moot. Failure to provide a deficiency notice in violation of 26 U.S.C. § 6212(a) is not a case within a class normally incapable of appellate review because of the lapse of time. *See Alioto*, 549 F.2d at 142. There is no evidence that an assessment is likely to occur again, let alone an assessment in violation of section 6212(a). Failure to provide the requisite notice on two prior occasions does not create a "reasonable expectation" of a third transgression.

Plaintiff also seeks the return of all money secured or seized under the assessment and the payment of reasonable litigation costs pursuant to 26 U.S.C. § 7430(a). It seeks this relief as part of the requested injunction. While it is true that some courts have allowed a return of seized property as part of the injunctive relief where there has been a failure to give notice of deficiency, *see, e.g., Rambo v. United States*, 492 F.2d 1060, 1064 (6th Cir. 1974), *cert. denied*, 423 U.S. 1091 (1976), that does not relieve plaintiff of making the necessary showing for an injunction. In this circuit plaintiff must show irreparable injury and the absence of an adequate legal remedy. *See Perlowin v. Sassi*, 711 F.2d 910, 912 (9th Cir. 1983); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313-14 (9th Cir. 1982). This court has similarly ruled in an earlier case filed by plaintiff. *See W. C. Garcia & Associates, Inc. v. Sassi*, Civ. No. 84-0224 MHP (Order Denying Preliminary Injunction filed March 12, 1984). Plaintiff has failed to make this showing.

Furthermore, plaintiff cannot use these proceedings in lieu of an action for refund and avoid its jurisdictional prerequisites under 26 U.S.C. § 7422(a). Plaintiff has not brought this action under section 7422(a) nor has he made the necessary allegations to state a section 7422(a) claim. *See Zernial v. United States*, 714 F.2d 431, 434 (5th Cir. 1983). For the same reasons articulated in the March 12, 1984 order, this court finds that plaintiff has failed to show irreparable injury and absence of an adequate legal remedy. Accordingly, all injunctive relief is denied, plaintiff's motion for summary

judgment is denied, defendant's motion for summary judgment is granted and this action is dismissed.

IT IS SO ORDERED.

Dated: July 22, 1988

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
*United States District Judge*